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SUPREME COURT OF THE UNITED STATES

ROBERT BAKER,

Petitioner

v.

STATE OF MISSOURI

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MISSOURI

JAMES C. JONES
411 North Seventh Street
St. Louis, Missouri 63101
Attorney for Petitioner

EUGENE H. BUDER
411 North Seventh Street
St. Louis, Missouri 63101
Of Counsel
American Civil Liberties
Union of Eastern Missouri

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CITATIONS

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The petitioner, Robert Baker, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri affirming the conviction of petitioner and the sentence of death.

OPINION BELOW

The opinion of the Supreme Court of Missouri, reported at 636 S.W.2d 902, appears at Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered August 23, 1982. Petitioner's motion for rehearing filed in that court was denied September 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

OTHER PARTIES TO THE PROCEEDING
IN THE SUPREME COURT OF MISSOURI

The only respondent in the proceedings in the Supreme Court of Missouri was the State of Missouri. However petitioner was one of numerous appellants in a separate proceeding in that court entitled State of Missouri v. Lawrence Payne, wherein one of the issues was the validity of the indictment in petitioner's

case. That issue was briefed and argued in the Supreme Court of Missouri by counsel in the Payne case. At the request of counsel in petitioner's principal case, the two cases were consolidated in the Supreme Court of Missouri as regards the single issue pertaining to the indictment. In due course, the Supreme Court of Missouri ruled on that issue in this case. (Op. 8-13) It is believed that the other appellants in the Payne case have no interest in the outcome of the petition for writ of certiorari filed by petitioner herein.

QUESTIONS PRESENTED

I

The only direct evidence of petitioner's guilt consisted of petitioner's confession. The confession tended to show both conventional murder and felony murder committed in the course of a robbery. The questions presented are: (1) whether the decisional inconsistency of the Missouri Supreme Court as to what constitutes a lesser included offense--resulting, in the case at bar, in a ruling that petitioner was not entitled to an instruction on felony murder--operated to deprive petitioner of constitutional due process of law; (2) whether the trial court was required, as a matter of constitutional due process of law, to give the jury an instruction on felony murder to provide an alternative to a conviction carrying the death penalty.

II

Whether the death sentence should be set aside on grounds of constitutional due process of law for the reason that the finding of the jury as regards the aggravating circumstance pertaining to the murder of a police officer is not inconsistent with a finding that the petitioner did not himself shoot the

victim or attempt to do so and did not intend that a killing take place.

III

Whether, under the circumstances of this case, the aggravating circumstance pertaining to the murder of a police officer requires, as a matter of constitutional due process of law, a determination that petitioner knew that the victim was a police officer; and whether the imposition of the death penalty herein constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

IV

Whether the death sentence should be set aside because there was insufficient evidence, as a matter of constitutional due process of law, to support the jury's finding as regards the aggravating circumstance; and if there was sufficient evidence, whether constitutional due process of law requires a finding by the jury that petitioner knew that the victim was a police officer.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment VIII:

"Excessive bail shall not be required, or excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV, sec. 1:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law."

STATUTES INVOLVED

RSMo 1969 sec. 559.010 provided:

"Murder in the first degree.--Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree."

The Missouri legislature repealed this statute effective September 28, 1975 and enacted sec. 559.005 et seq. (see RSMo 1975 supplement). Sec. 559.005 and sec. 559.007 provided as follows:

"559.005. Capital murder defined.--A person is guilty of capital murder if he unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of a human being."

"559.007. First degree murder defined.--The unlawful killing of a human being when committed without a premeditated intent to cause the death of a particular individual but when committed in the perpetration or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping is murder in the first degree."

The Missouri legislature repealed these sections effective May 26, 1977 and enacted in lieu thereof sec. 565.001 et seq. Pertinent sections are as follows:

"565.001. Capital murder defined.--Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder."

"565.003. First degree murder defined.--Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping."

"565.004. Murder in the second degree.--All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree."

"565.008. Death penalty, when imposed--life imprisonment, when imposed--minimum of fifty years to be served, when--first and second degree murder, penalties for.--1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections

565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years on his sentence.

2. Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives . . ."

"565.012. Evidence to be considered in assessing punishment in capital murder cases.--1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence . . .

2. Statutory aggravating circumstances shall be limited to the following: . . .

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty."

STATEMENT

Petitioner was convicted of capital murder in the Circuit Court of the City of St. Louis and was sentenced to death. The Missouri Supreme Court affirmed.

The State's Evidence

Gregory Erson was a police officer employed by the St. Louis Metropolitan Police Department. On June 19, 1980 he was temporarily assigned to work at the "Stroll", a high crime area in the City of St. Louis as an undercover agent on a prostitution detail. (T. 222) He drove an unmarked automobile and wore blue jeans and a softball shirt. (T. 263)

At about 11:30 PM he was parked on the south side of Westminster Avenue. There was a shooting. (T. 291) Police officer Michael Ciaccio arrived at the scene shortly thereafter. He saw Erson's dead body lying on the front seat of the automobile. Erson's wallet, which contained his police badge, was in his back pocket. A police miniature radio was on the front seat,

partially covered by Erson's body. (T. 275)

The next day petitioner learned that the police were looking for him, and he turned himself in. He was interrogated by two detectives assigned to the Homicide Division, and made a statement substantially as follows. (T. 443-57) (*) On the previous evening, Leslie Lomax and Lonnie Moyers came for him at his residence, and they rode in a pickup truck, Moyers doing the driving. They drove to Lomax' house, where Lomax obtained a pistol. Lomax asked petitioner if he would like to make some money and petitioner agreed. They rode around the Stroll looking for someone to rob. At about 11:30 PM they noticed an automobile parked on Westminster Ave. They parked the truck a short distance away. There was a man in the automobile and Lomax approached the automobile and talked to him. The man told Lomax that he was looking for a date. Lomax came back to the truck and told petitioner that the man probably had money. Thereupon Lomax and petitioner both went to the automobile to rob him. Petitioner went to the passenger side of the automobile and Lomax to the driver's side. Petitioner, holding Lomax' pistol at his side, demanded the man's money. When the man reached for a gun in a holster on his left leg, petitioner shot him. Petitioner took about $60 out of the man's pocket. He saw a pistol lying on the floor between the seat and the door on the driver's side, and he took that too. Petitioner and Lomax then went back to the truck and petitioner divided the money with Lomax and Moyers, and gave Lomax both pistols. Then they left the scene.

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(*) At the trial, petitioner asserted that this statement was involuntary because it was the result of beatings by the police. The trial court denied his motion to suppress the statement and this ruling was affirmed by the Missouri Supreme Court. No issue is made as to this matter in the present proceeding.

A tape recording was made of this statement, and the tape was played before the jury at the trial.

Dr. George Gantner, Jr., the chief medical examiner of the City of St. Louis, performed an autopsy on Erson's body. He testified at the trial that Erson was killed by a single gunshot wound which entered the right side of the body and exited the left side. (T. 343) He said that if Erson had been sitting at the driver's seat of the automobile, the gunshot would have come from the passenger side; it could not have come from the driver's side. (T. 344)

A bullet was found at the scene of the shooting. (T. 361-62) Sometime later, the police recovered the gun which Erson had with him that evening. (T. 378) A ballistics expert testified for the prosecution that the bullet came from Erson's gun. (T. 394)

Petitioner's Evidence

Petitioner testified that he remained in the truck while Lomax and another person confronted the man in the automobile, and that he was in the truck when the shooting occurred (T. 472); that he did not see a gun that evening (T. 481, 504); that he did not know that the others intended to rob the man (T. 481); and that he did not know the man was a police officer (T. 520).

As mentioned, the jury found petitioner guilty of capital murder. At the second stage of the trial, the jury made an affirmative finding as to the aggravating circumstance that the murder was committed against a peace officer while engaged in the performance of his official duty. The jury assessed the punishment at death, and petitioner was sentenced accordingly.

ARGUMENT

I

The felony murder issue

The Missouri Supreme Court ruled that the trial court did not err in failing to instruct the jury on felony murder. (Op. 2-4) We asserted in that court, and we assert here that petitioner was entitled to such an instruction. The issue is of constitutional dimension.

The Missouri Supreme Court has said that the same evidence may support a finding of conventional (capital) murder and also felony murder. State v. Turner, 623 S.W.2d 4, 8 (1981). Petitioner was convicted of capital murder on the basis of his confession. (T. 443-57) It is apparent that the confession also supported a finding that petitioner shot Erson in the perpetration or the attempt to perpetrate a robbery. He stated (T. 446):

> ". . . We was ridin' and we seen this car parked at the curb on Westminster. We pulled in front of the car, and Les got out of the truck and went and said something to him, or whatever. I was in the truck. I don't know what he said. And then he came back and said he wanted a date, and he had some money. So, me and Les started back to the car. I went around on the passenger side and asked for his money.
>
> "DETECTIVE MC COY: How did you ask for it?
>
> "MR. BAKER: Told him to give me his money. And he reached down as if he was reaching for a gun or something, and I shot him. And then, I went down to the driver's side, and I got the money out his pocket . . ."

The jury was instructed with regard to capital murder (Instruction No. 7, L.F. 56), murder in the second degree (Instruction No. 8, L.F. 57), and manslaughter (Instruction No.

9, L.F. 58). Instruction No. 7 (MAI-CR2d 15.02) was as follows:

INSTRUCTION No. 7

"If you find and believe from the evidence beyond a reasonable doubt:

First, that on June 19, 1980, in the City of St. Louis, State of Missouri, the defendant or another person caused the death of Gregory Erson by shooting him, and

Second, that the defendant or another person intended to take the life of Gregory Erson, and

Third, that the defendant or another person knew that he was practically certain to cause the death of Gregory Erson, and

Fourth, that the defendant or another person considered taking the life of Gregory Erson and reflected upon this matter coolly and fully before doing so,

then you are instructed that the offense of capital murder was committed, and if you further find and believe from the evidence beyond a reasonable doubt:

Fifth, that before or during the commission of such offense and with the purpose of promoting its commission, the defendant aided or attempted to aid such other person in committing the offense,

then you will find the defendant guilty of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense."

Instruction No. 8 (MAI-CR2d 15.14) pertaining to second degree murder, is in the same general form as Instruction No. 7, except that the first three submissions of fact are as follows

(L.F. 56):

"First, that on June 19, 1980 in the City of St. Louis, State of Missouri, the defendant or another person caused the death of Gregory Erson by shooting him and

Second, that the defendant or another person intended to take the life of Gregory Erson, and

Third, that the defendant or another person did not do so in fear suddenly provoked by the unexpected acts or conduct of Gregory Erson,

then you are instructed that the offense of murder in the second degree was committed . . ."

The Missouri statute pertaining to felony murder, denominated first degree murder, is RSMo 565.003, which provides:

> "Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping."

This offense carries punishment of life imprisonment. RSMo sec. 565.008(2).

The Missouri approved Instruction relating to this offense is MAI-CR2d 15.12. If it had been given to the jury by the trial judge, it would have been as follows (as adapted to the circumstances of this case):

INSTRUCTION NO. ___

"If you find and believe from the evidence beyond a reasonable doubt:

First, that on June 19, 1980 in the City of St. Louis, State of Missouri, that defendant caused the death of Gregory Erson by shooting him, and

Second, that he did so in robbing or attempting to rob Gregory Erson,

then you will find the defendant guilty of murder in the first degree . . ."

The trial judge considered giving such an instruction but finally decided against it. (T. 563-66)

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In the last several years the decisions of the Missouri Supreme Court regarding the relationship between capital murder (that is, conventional murder) and felony murder have been characterized by very considerable inconsistency and ambivalence. Primarily the problem has been whether one of these offenses is a lesser included offense of the other. Prior to September 1975 both conventional murder and felony murder were covered by the same statute, RSMo sec. 559.010, and both were denominated first degree murder. A charge of first degree murder embraced every grade or degree of criminal homicide. State v. Clark, 546 S.W. 2d 455, 470 (25) (Mo.App. 1976). Felony murder was an included offense of first degree conventional murder, and conventional murder second degree was an included offense of felony murder. State v. Jewell, 473 S.W.2d 734, 739 (1971).

Then in 1975 the Missouri legislature enacted new homicide statutes. Capital murder (previously first degree conventional murder) was one section, RSMo 559.005 (later sec. 565.001). Felony murder was another section, RSMo 559.007 (later sec. 565.003). In due course the Missouri Supreme Court was confronted with the question of whether a defendant charged with felony murder could be convicted of second degree conventional murder. (RSMo 565.004) The court ruled that he could not because the elements were different in each instance. State v. Handley, 585 S.W.2d 458 (1979). Under the Handley rule, one of these offenses was not a lesser included offense of the other;

439 U.S. 14.

CONCLUSION

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

James C. Jones
JAMES C. JONES
411 North Seventh Street
St. Louis, Missouri 63101
Attorney for Petitioner

Eugene H. Buder
EUGENE H. BUDER
411 North Seventh Street
St. Louis, Missouri 63101
Of Counsel
American Civil Liberties
Union of Eastern Missouri

and if a defendant was charged with capital murder, the trial court could not instruct on felony murder, and vice versa as regards second degree (conventional) murder.

Less than two years later, the Missouri Supreme Court rejected the Handley rule and returned to the previous rule. In State v. Wilkerson, 616 S.W.2d 829 (1981) the court, noting that the Handley rule "has caused considerable consternation in the Bench and Bar of this State" (616 S.W.2d at 830) ruled that a defendant charged with felony murder could be convicted of second degree conventional murder. The basis for this holding was that second degree conventional murder was a lesser degree of offense of felony murder. The court ruled that the Handley case rule should no longer apply. Under the Wilkerson rule, where a defendant was charged with capital murder, it was reversible error not to give the jury an instruction on felony murder where the evidence supported felony murder. State v. Gardner, 618 S.W.2d 40 (Mo. 1981). Under the Wilkerson rule, where a defendant was charged with capital murder, the trial judge was required to give an instruction on any degree of homicide which was "justified by the evidence." Id., 618 S.W.2d at 41.

That was the state of the law when the present case came before the Missouri Supreme Court. Appellant was charged with capital murder and the trial court failed to instruct on felony murder. Petitioner relied on State v. Gardner, supra. However the court changed its ruling again and held that the trial court properly did not instruct on felony murder. The basis for this ruling was that felony murder is not a lesser included offense of capital murder. The court ruled that State v. Gardner was no longer the law, and affirmed petitioner's conviction.

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Our points of complaint are two. First, petitioner has been a judicial victim of a violation by the Missouri Supreme Court of standards of decisional consistency that are expected of state courts. Compare Boule v. City of Columbia, 378 U.S. 347, 354. Under Missouri law as it existed prior to 1975, felony murder was a lesser included offense of conventional murder. Under the Handley rule in 1979, it was not a lesser included offense. Under the Wilkerson rule in 1981, it was a lesser included offense. Under the present case in 1982, it was not a lesser included offense.

This inconsistency is not a trivial or inconsequential matter because capital murder carries the death penalty if the jury so assesses the punishment; felony murder is punishable by life imprisonment. The difference is a matter of constitutional cognizance. "As we have stated, there is a significant constitutional difference between the death penalty and lesser punishments." Beck v. Alabama, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389. As one writer has said, ". . . state courts may not juggle their laws in an unpredictable and inconsistent fashion to the prejudice of federal constitutional rights." (Citations omitted) Donohue, Death Penalty, 30 Catholic Law Rev. 1, 57. Life and death cannot depend on shifting and variable notions of lesser offenses. There is a fundamental injustice when one defendant committing a particular offense at one point in time is not subject to the death penalty, whereas another defendant who has committed the same offense at another point in time is subject to that penalty. "Yet most dramatically when life is at stake, equality is, as it is generally felt to be, a most important element of justice." (ALI, Model Penal Code and Commentaries, Part II, p. 114, par. 210.6)

In the second place, we contend that the Missouri Supreme Court erred in that its ruling operates to deny petitioner constitutional due process of law by depriving him of the protection afforded by an instruction on a lesser offense--that is, an instruction which was supported by the evidence and which carries a punishment other than the death penalty. In Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, this Court held that the failure of the state of Alabama to permit the jury to find that the accused--charged with capital murder--committed felony murder as an alternative, was constitutionally impermissible. The Court said (447 U.S. at 637-38, 100 S.Ct. at 2389-90):

> ". . . For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> "Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishment: . . .
>
> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion', we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case."

The Missouri Supreme Court's opinion herein attempts to distinguish the Beck case on grounds that felony murder is not now a lesser included offense under Missouri law (although, as mentioned above, that court was of a different view in State v. Jewell, supra, 473 S.W.2d 734, and in State v. Wilkerson, supra, 616 S.W.2d 829). Also the Missouri Supreme Court said that in any event there was a "third option" granted by way of the trial

court's instruction to the jury on second degree murder.

We think that the Missouri Supreme Court's rationale in attempting to distinguish the Beck case is not acceptable. When the prosecution's evidence in a capital case supports a finding of guilt on a charge which carries a lesser punishment than death, the failure to grant the petitioner the protection afforded by an instruction on that charge is constitutionally impermissible whether or not such an alternative offense is technically described--at one or another point in time--as a "lesser included offense".

Moreover, the trial court's instruction on second degree (conventional) murder plainly did not permit the jury the option of finding that the shooting took place in the course of the perpetration of or the attempt to perpetrate robbery. That instruction was not--contrary to the Missouri Supreme Court's view of the matter--a valid alternative.

We submit that the ruling in the Beck case applies, and requires a reversal of the Missouri Supreme Court on this issue.

II

The jury's verdict assessing the death penalty is not inconsistent with a finding that petitioner did not himself shoot the victim.

The only direct evidence of petitioner's participation in the robbery and the murder consisted of petitioner's confession wherein he stated that he and Lomax together approached the parked automobile--petitioner from the passenger side and Lomax from the driver's side; that petitioner demanded the man's money; and that when the man reached for a gun in a holster of his left leg (T. 417), petitioner shot him. A pathologist testified for the prosecution that the victim's death occurred from

a gunshot which came from the passenger side of the automobile.

But there was other highly relevant evidence produced by the prosecution as to how the shooting occurred. A ballistics expert testified that the bullet which killed Erson was fired from Erson's gun. Erson's gun was in his holster on his left leg at the driver's side of the automobile. (T. 280-81, 287) There is an obvious contradiction here. If petitioner's confession is believed (and clearly the jury believed it and the Missouri Supreme Court accepted it), then petitioner--at the passenger side of the automobile--shot Lomax' gun and not Erson's gun. On the other hand, if petitioner's confession is accepted insofar as it places Lomax on the driver's side, and if the ballistics expert's testimony is accepted to the extent that the gunshot came from Erson's gun, then there should be a finding that Lomax did the shooting because only Lomax, and not petitioner, was in a position to fire Erson's gun.

That being the situation, the trial judge in his instructions gave the jury two choices as regards the issue of guilt: (1) whether petitioner shot Erson, or (2) whether Lomax shot Erson and petitioner aided and abetted him. This is exactly what Instruction No. 7 hypothesized. (See p. 9, supra) We cannot determine from the verdict which of these theories the jury accepted. (*) And insofar as liability on the charge of capital murder is concerned, it makes no difference because the statute applies to aiders and abettors as well as to those who do the actual killing. State v. Turner, 623 S.W.2d 4, 8 (Mo. 1981).

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(*) The verdict reads: "We, the jury, find the defendant guilty of capital murder, as submitted in Instruction No. 7." (L.F. 73)

At the second stage of the trial, the court submitted the following aggravating circumstance (L.F. 67): "Whether the murder of Gregory Erson was committed against a peace officer while engaged in the performance of his official duty. It was the official duty of Gregory Erson to investigate possible incidents of prostitution in an area of the City of St. Louis, in his capacity as an officer of the St. Louis Metropolitan Police Department." The jury made an affirmative finding as to this. Its written response was (L.F. 74): "The murder of Gregory Erson was committed against a peace officer while engaged in the performance of his official duty. It was the official duty of Gregory Erson to investigate possible incidents of prostitution in an area of the City of St. Louis, in his capacity as an officer of the St. Louis Metropolitan Police Department."

But this finding also does not state whether petitioner or Lomax did the shooting. Obviously the jury could have found that Lomax rather than petitioner committed that act. But if Lomax did it, and if petitioner did not intend to do it, then the death penalty does not apply to petitioner. In Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368, 3376 (1982) (*) this Court said:

> "Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not."

Thus the aggravating circumstance here in question simply

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(*) The Enmund case was decided on July 2, 1982, subsequent to the time the Missouri Supreme Court took the present cause under submission on May 17, 1982 and before its decision on August 23, 1982.

does not determine the matter. At the very least, in order to properly submit the issue, the trial court's instruction should have required a finding beyond a reasonable doubt whether petitioner himself shot Erson, or that, if he did not, whether petitioner attempted to kill or intended that a killing take place or that lethal force be employed. The submission to the jury was error because it lacks--in this respect--objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death. Woodson v. North Carolina, 428 U.S. 280, 303.

In our argument at Points III and IV, infra, we refer to the petitioner as the person who did the shooting; but this is an assumption for the purpose of argument and should not be considered as conceding that that was the way the homicide occurred.

III

The knowledge issue

In the Missouri Supreme Court, the dissent parted from the majority on this issue. The dissent interpreted the majority as not requiring knowledge on the part of the petitioner that the victim was a police officer. We agree with this interpretation. The majority notes the petitioner's contention in his appeal to that court that such knowledge should be required because otherwise the mens rea is absent. The majority then--although it says in passing that the evidence was sufficient to support such knowledge--nevertheless declares "we decline to address the unscrutable (sic) question of mens rea." (Op. 7) The dissent states plainly that a decision regarding such knowledge is essential to a proper finding as to the aggravating circumstance. It said: "The notion of mens rea is deeply rooted in American

jurisprudence. American criminal law has long joined the guilty act with the guilty mind and has consistently required wrongdoing to be conscious to the criminal. Morissette v. United States, at 251-57. Today, this court seeks to sever that tie, and sets a dangerous precedent by interpreting sec. 565.012.2(8) as not requiring knowledge as an element of an aggravating circumstance." (Dissent p. 5)

We think that the dissent is clearly correct in requiring knowledge. We add the following thereto.

(1)

The fact that the Missouri legislature made the murder of a police officer a specific category of aggravating circumstance and subject to the death penalty necessarily requires that there be an intent on the part of the accused to murder a person known to be a police officer in order to commit this special type of offense. This Court in Morissette v. United States, 342 U.S. 246 (1952) discussed the matter of intent at length. There the Court drew a distinction between (1) petty crimes, and public welfare offenses constituting violations of police or social regulations, which as a matter of policy and effective enforcement dispense with a requirement of intent, and (2) serious, common law offenses such as stealing and larceny, which require proof of intent. The court said (l.c. 260-61):

> "Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland is '. . . as bad a word as you can give to man or thing.' State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses. If any state has deviated, the exception has neither been called to our attention nor disclosed by our research."

Certainly if stealing and larceny "stir a sense of insecurity in the whole community" and "arouse a public demand for retribution" and carry a "high penalty", surely a special type of crime calling for the death penalty should be considered in that category of serious offense which requires an intent to commit that particular crime.

(2)

Secondly we contend that the rulings of this Court regarding the requisites for the application of the death penalty necessitate a determination that the petitioner knew that the victim was a police officer.

In Hopper v. Evans, ____ U.S. ____, 102 S.Ct. 2049, 2052, this Court said: "Our holding in Beck, like our other Eighth Amendment decisions in the past decade, was concerned with assuring that sentencing discretion in capital cases was channelled so that arbitrary and capricious results would be avoided." An essential feature of this approach is that the sentencing procedure guide and focus "the jury's objective consideration of the particularized circumstance of the individual offense." Jurek v. Texas, 428 U.S. 262, 273-74. The "particularized circumstances" of the specific offense here necessarily must require knowledge on the part of the accused that the victim was a police officer. Otherwise the offense cannot be distinguished from the numerous instances in which a homicide is committed in the perpetration of or attempt to perpetrate robbery and in which the punishment is life imprisonment (compare, RSMo sec. 565.003; 565.008(2)); and "there is no meaningful basis for distinguishing the few cases in which it (the death penalty) is imposed from the many cases in which it is not." (Furman v. Georgia, 408 U.S. 238, 313, White J., concurring)

To the same effect is Woodson v. North Carolina, 428 U.S. 280, 303-304.

(3)

The imposition of the death penalty in absence of the element of knowledge also constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Although that Amendment is not in terms referred to by the Missouri Supreme Court's dissent, that is the clear import of portions of that opinion.

> ". . . The defendant is to be executed on the sole ground that the capital murder was committed against a peace officer while engaged in the performance of his official duty, sec. 565.012.2(8), without the jury at any stage in the trial being required to find that defendant knew or should have known that the victim was a member of the class described.
>
> "This is to be the outcome regardless of the fact that the victim was purposely disguised so that people would not know he was a police officer on duty. The impression deliberately sought to be made upon others was that the victim was a private citizen . . . (Dissent, p. 1)
>
> ". . . This defendant will likely be executed for the entirely fortuitous circumstance that the victim, who was dressed in civilian clothes and who to all appearances was a private citizen, turned out to be unknown to defendant, a police officer . . ." (Id, p. 5)

We add the following to the dissent's discussion.

In Roberts v. Louisiana, 431 U.S. 633 (1977), this Court set aside the death sentence as a violation of the Eighth and Fourteenth Amendments. There the state statute required the imposition of the death penalty in cases of first degree murder, and one of the subsections of first degree murder pertained to the killing of a police officer. Defendant was convicted of that offense. The Court ruled that the mandatory method was unacceptable. "Because the Louisiana statute does not allow for consideration of particularized mitigating circumstances it is unconstitutional." 431 U.S. at 637

In a similar way, the imposition of the death penalty in the case at bar is in violation of the Eighth and Fourteenth Amendments in that it was assessed arbitrarily and without regard to the mitigating circumstance that the petitioner did not know that the victim was a police officer.

Therefore we submit that the validity of the aggravating circumstance in this case depends on a determination that the petitioner knew that Erson was a police officer. On the assumption that we are correct in this position, we now make two further contentions: first, that the evidence was insufficient as a matter of law to support a finding that petitioner knew that the victim was a police officer; and second, that if the evidence was sufficient in that regard, then the jury's verdict assessing punishment is invalid because it is necessary that there be a jury finding as to such knowledge.

IV

Determination of the knowledge issue

(1)

Insufficiency of the evidence

We repeat briefly what was said in connection with Point I supra. The petitioner's confession was the only direct evidence of his guilt. According to that confession, he shot Erson while confronting him at the passenger's side of the automobile. The pathologist testifying for the prosecution stated that the bullet that killed Erson came from the passenger side of the automobile. On the other hand, the ballistics expert testifying for the prosecution stated that the bullet came from Erson's gun. But Erson's gun, by all accounts, was in his holster on his left leg, next to the driver's door. Lomax was confronting Erson from the driver's door.

Considering these facts, how can it possibly be found that petitioner shot Erson from the passenger side with Erson's gun which was on the driver's side of the automobile? Yet that is the essential basis for the majority opinion's statement that the evidence was sufficient to show that petitioner knew that Erson was a police officer. That opinion says (p. 7): "There was a police radio on the front seat of the car. Ballistics evidence showed that Erson was shot with the revolver issued to him by the police department. The evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that appellant knew Erson was a police officer."

The plain implication of the court's statement is that the evidence established that the petitioner shot Erson with his own gun. But a rational trier of fact would be so hopelessly confused by the contradictory evidence in that regard that he could reach an affirmative finding only by applying sheer speculation.

We submit that the evidence pertaining to petitioner's knowledge does not meet the standards applicable to proof beyond a reasonable doubt, and therefore that this aggravating circumstance should not have been submitted to the jury. (Jackson v. Virginia, 443 U.S. 316, 317-19)

(2)

Necessity of requiring a jury finding as to knowledge

We submit that our contention as to (1) above is sound and should be sustained. Our contention here, at (2), is in the alternative: If this Court overrules our contention as to (1), then the jury's finding as to the aggravating circumstance should be set aside because there was no finding by the jury on the issue of knowledge.

The majority opinion approving the jury's finding as regards the aggravating circumstance does not consider whether there should be a jury finding as to petitioner's knowledge. The dissent asserts that such a finding is essential. It states: "While the principal opinion pronounces that the evidence 'established beyond a reasonable doubt' that defendant knew the victim was a police officer, this is a disputed issue of fact, which was for the jury, not this court, to resolve." (Dissent, p. 2)

We submit that the dissent is right. We add the following thereto.

In Gregg v. Georgia, 428 U.S. 153, 189, this Court said (joint opinion of Stewart, Powell, and Stevens, JJ.):

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

And in Godfrey v. Georgia, ____ U.S. ____, 100 S.Ct. 1759, 1764-65, the Court said:

> ". . . (A State) must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process of imposing a sentence of death.'"

That means, in the case at bar--if knowledge is an essential element--that the jury must make a finding with regard thereto; and that the jury must be instructed that it can make an affirmative finding only if there is proof beyond a reasonable doubt.

Note that the Court in the cases above cited refers to the sentencer's discretion. It is not a matter for the Missouri Supreme Court to decide as if it were the jury. Here the Missouri Supreme Court simply usurped the jury's function and duty. See also Sandstrom v. Montana, 442 U.S. 510; Fresnell v. Georgia,

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT BAKER,

Petitioner

v.

STATE OF MISSOURI

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Robert Baker, who is now held in the Missouri State Penitentiary, asks leave to file the attached petition for writ of certiorari to the Supreme Court of Missouri without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Petitioner's affidavit in support of this motion is attached hereto.

Petitioner states that he was heretofore granted leave to proceed in forma pauperis when this cause was pending in the Circuit Court of the City of St. Louis, State of Missouri (leave granted July 23, 1980); and again when the cause was pending on appeal to the Supreme Court of Missouri (leave granted July 2, 1981).

JAMES C. JONES
411 North Seventh Street
St. Louis, Missouri 63101
Attorney for Petitioner

Copy mailed to Ms. Kristie Green, Assistant Attorney General, State of Missouri, attorney for respondent, this _____ day of October, 1982.

Attorney for Petitioner

SUPREME COURT OF THE UNITED STATES

ROBERT BAKER,)
)
Petitioner)
)
v.)
)
)
MISSOURI)

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, Robert Baker, being first duly sworn, depose and say that I am the person in the above-entitled case; that in support of my motion to proceed on petition for certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe that I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this proceeding are true.

1. Are you presently employed? No Not any funds

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No

3. Do you own any cash or checking or savings account? No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

5. List the persons who are dependent upon you for support and state your relationship to those persons. Two Daughters, Verleen Baker and Dana Baker

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Robert Baker CP-9
Robert Baker

Subscribed and sworn to before me this ___ day of

_____, 1982

Rita V. Baker
Notary Public

My commission expires _____

Supreme Court of Missouri

en banc

DUPLICATE
OF FILING ON

AUG 2 3 1982

IN OFFICE OF
CLERK SUPREME COURT

STATE OF MISSOURI,)
)
Respondent,)
)
vs.) No. 63244
)
ROBERT BAKER,)
)
Appellant.)

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
DIVISION NO. 13
THE HONORABLE CARL R. GAERTNER, Judge

Appellant Robert Baker was convicted of capital murder by a jury in the Circuit Court of the City of St. Louis and was sentenced to death. Following rendition of judgment and imposition of sentence, an appeal was perfected to this Court. This Court has exclusive appellate jurisdiction under Mo. Const. art. V, § 3.

Gregory Erson was a police officer in the City of St. Louis. On June 19, 1980, he was assigned to work at the "Stroll", a high crime area, as an undercover agent on the prostitution detail. He drove an unmarked automobile, and wore blue jeans and a soft-ball shirt.

Appellant was also in the area of the "Stroll" on the evening of June 19, 1980. He and companions, including Leslie Lomax, were driving around the area in a pickup truck. They were seeking robbery victims so they could obtain money to purchase illegal drugs. At approximately 11:30 p.m. appellant and the others noticed Erson's car parked on Westminster near the corner of Westminster and Whittier. As they passed the car, they saw Erson in it and decided to make him their victim. They made a right turn off Westminster onto Whittier, and parked the truck out of Erson's view. Lomax then left the truck and

went over to talk with Erson. Upon returning to the truck, he told the others that Erson had money because he said he wanted a "date." Lomax and appellant approached the automobile--Lomax on the driver's side and appellant on the passenger side. The windows of the front doors were open. According to appellant's confession, he shot Erson.

The police arrived at the scene soon after the shooting. Erson was found slumped over in the front seat of the car. His police radio was partially visible, although he was lying on it. His police department revolver was missing. Erson's revolver had been used to shoot him in the back near his right armpit. The bullet passed through his body in a downward path, cutting through his heart and right lung. He died of massive internal bleeding.

Appellant first contends the trial court erred in failing to give an instruction on murder first degree.

Appellant asserts the trial court erred in failing to instruct on first degree murder because State v. Gardner, 618 S.W.2d 40 (Mo. 1980), requires that such an instruction be given where the evidence supports it. The specific question here is: Assuming sufficient evidence, is it error, when only capital murder is charged, to fail to submit a first degree murder instruction in a trial for capital murder committed after January 1, 1979? The answer is "no." Gardner does not control this case. Gardner does not stand for the proposition that first degree murder is a lesser included offense of capital murder under the New Criminal Code. The crime in Gardner was committed August 31, 1978. See State v. Mercer, 618 S.W.2d 1, 3 (Mo. banc 1981). The effect of § 556.031, RSMo 1978, is that crimes committed prior to January 1, 1979, are not governed by the Code. § 556.031.1 and .3. Section 556.220, RSMo 1969 (repealed), governed what was a lesser included offense of capital murder in Gardner. Gardner necessarily held that under § 556.220 (repealed), first degree murder was a lesser included offense of capital murder because it was an "offense inferior to that charged in the indictment." § 556.220. This was a correct declaration of the law which controlled the holding in Gardner.

Is first degree murder a lesser included offense of capital murder under § 556.046, RSMo 1978? Section 556.046 provides in pertinent part as follows:

"1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:

(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(2) It is specifically denominated by statute as a lesser degree of the offense charged. . . ."

This Court has recognized that an offense can be a lesser included offense of another either: (1) when its elements are necessarily included therein, or (2) when by statute it is specifically denominated as a lesser degree of the offense charged. State v. Wilkerson, 616 S.W.2d 829, 833 (Mo. banc 1981). The "elements test" requires that the lesser offense be established by proof of the same or less than all the facts required to prove the greater offense. State v. Smith & Hodges, 592 S.W.2d 165 (Mo. banc 1979). First degree murder in Missouri requires proof of commission of a felony; capital murder does not. Therefore, first degree murder is not a lesser included offense of capital murder on their elements. Nor can first degree murder be described as "specifically denominated by statute as a lesser degree" of capital murder. Cf. Wilkerson, supra. Consequently, under § 556.046, RSMo 1978, first degree murder is not a lesser included offense of capital murder.

In further support of this conclusion, it is noted that the General Assembly has, concurrent with the change brought about by § 556.046.1(2), made a change in what offenses the trier of fact in a capital murder case is to consider. Section 565.006.1, RSMo Supp. 1979, no longer requires, as did § 565.006.1, RSMo 1978, that the trier of fact in a capital murder case consider "whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, [or] manslaughter." See Historical Note to § 565.006.1, RSMo Supp. 1979.

Having ruled that first degree murder is not a lesser included offense of capital murder, we must then determine the constitutional viability of the resulting instructional scheme in light of Beck v. Alabama, 447 U.S. 625 (1980). Beck requires that the trier of fact in a capital murder case be allowed to consider lesser included offenses supported by the evidence. Cf. Hopper v. Evans, _____ U.S. _____, (No. 80-1714, May 24, 1982). The

Beck requirement prevents the jury from being in an "all or nothing" situation in which it might err on the side of conviction. Although Beck is not precisely on point, due to the fact that first degree murder is not a lesser included offense of capital murder in Missouri, examination of the elements of the homicides, notably the mental states, illustrates that it is second degree murder, not first degree murder, which would sufficiently test a jury's belief of the crucial facts for a conviction of capital murder. See § 565.001, RSMo 1978; § 565.003, RSMo 1978; § 565.004, RSMo 1978; State v. Franco, 544 S.W.2d 533, 535 (Mo. banc 1976), cert. denied 431 U.S. 957 (1976). Therefore, omitting first degree murder from the instructional scheme, where only capital murder is charged, does not run afoul of Beck.

Appellant next contends the trial court erred in overruling his motion to suppress his confession because the prosecution failed to sustain its burden of proving by a preponderance of the evidence that the confession was made freely and voluntarily and that it was not obtained through physical abuse of appellant by police officers.

Appellant presented evidence at a pretrial hearing on a motion to suppress two recorded statements he gave to police. One statement was taken June 20, 1980, and the other was taken June 22, 1980.

At the hearing on the motion to suppress, photographs of appellant, taken on the morning of June 23, 1980, by an investigator for the Public Defender Bureau, were introduced to show the extent of his injuries. Appellant's sister testified that she saw appellant on the evening of June 22, 1980, and that he showed her injuries on his back and face and told her that he confessed on June 20 because the police beat him. Medical records from the St. Louis City Jail showed that on June 23, 1980, defendant complained of "bruises and three abrasions on the back," a scratch on his neck, and "generalized aching."

Appellant testified at the hearing that on June 20 he was beaten by numerous officers in Interview Room One; that they never informed him of his Miranda rights until the confession was taped; that within a few minutes of his arrival at Room One they handcuffed him to a chair, kicked him, slapped him, pulled his hair, burned his arms with cigarettes, yelled at him, and knocked him out of the chair; that the only reason he

confessed was because of the beating; that he "made up" some things in the confession that he thought they would want to hear; that Detective Fletcher knew that the beatings were going on and that he advised appellant to confess. Appellant also testified that he was beaten by police on June 20 after he gave the confession, but that he was actually beaten only on that day. Appellant stated that on June 21 police threatened him; that on June 22 police took another taped statement from appellant, forcing it from him with threats of more beating. On cross-examination, appellant testified that upon his arrival at police headquarters on June 20, news and media personnel filled the corridor immediately outside Room One where he was questioned.

Officers Fletcher and Crews testified for the State. Fletcher, who brought appellant in, testified that upon picking up appellant he informed him of his rights but did not interrogate or question him; that he took him to Interview Room One and left him there with Officers McCoy and Crews; that in the corridor outside Room One there were many newsmen; that he did stick his head in Room One a few times to see how things were progressing; that he only talked to appellant to ask him how things were going on those occasions; and that he knew nothing of the alleged beating. Officer Crews, one of the officers who questioned appellant, testified that he and Officer McCoy advised appellant of his Miranda rights when he arrived at the interviewing room; that appellant arrived at approximately three o'clock in the afternoon; that Room One is located directly south of the corridor leading to it, with one interior wall separating it from the corridor; that air vents run from the interviewing room out to the corridor; that he did not, nor did Officer McCoy, beat or threaten appellant in any way; that he told appellant that he had been named or implicated by Lomax and that "if he wanted to give his account, we would tape it"; that appellant made a statement, which was recorded; that the reporters and television cameras were still out in the hall after they had questioned appellant and that they walked with appellant past them; that he was then taken down and booked. Officer McCoy was unable to testify at the hearing due to hospitalization.

During the hearing the court thoroughly questioned appellant as to his alleged injuries and questioned Officer Crews as to the details of the recording of the June 20 statement. The court also made specific findings with respect to the photographs introduced by appellant. Reviewing all the

evidence, the court, in detailed findings, determined that appellant was not beaten prior to the June 20 recorded statement, and that appellant was advised of his rights and was aware of them prior to giving the statement. The court overruled appellant's motion to suppress the June 20 statement. With respect to the June 22 recorded statement, the court noted that the State offered no evidence to rebut appellant's allegations that it was obtained by threats of violence. The court sustained the motion to suppress with regard to the June 22 statement and declared it inadmissible.

At the trial, appellant renewed his motion to suppress. The trial court concurred with the rulings made by the court sitting at the suppression hearing, and the June 20 tape was played to the jury.

When a confession is obtained from a person while in custody, the State must prove, once the issue of admissibility is raised, that it has complied with Miranda and that the statement was voluntary. State v. Olds, 569 S.W.2d 745, 751-752 (Mo. banc 1978). The voluntariness of the confession must be established by a preponderance of the evidence. Id. Moreover, where there is conflicting evidence offered in a motion to suppress concerning the voluntariness of a statement, and that statement has been ruled by the trial court to be admissible, it is a matter of discretion not lightly disturbed. State v. Flowers, 592 S.W.2d 167, 170 (Mo. banc 1979). We are not warranted, on the record in this case, in overturning the finding of the trial court.

Appellant next contends the trial court erred in overruling his motion to limit cross-examination by barring the prosecutor from impeaching appellant by evidence of prior convictions.

In his motion for new trial, appellant raised error regarding the use of the prior convictions to impeach him during his testimony. Now, on appeal, appellant employs a new theory on this point. He asserts that the "Missouri practice of admitting evidence of prior convictions for impeachment purposes deprived [him] of constitutional due process of law and of equal protection of the laws under the Fourteenth Amendment of the United States Constitution, in that it permitted the prosecutor to present, at the guilt stage of the trial, evidence which was relevant only to the punishment stage of the trial."

The trial court ruled correctly on the allegation of error presented.

This Court has uniformly held that § 491.050, RSMo 1978, pertaining to the use of prior convictions to affect a witness' credibility, "confer[s] an absolute right to show prior convictions . . . for the purpose of impeachment." State v. Busby, 486 S.W.2d 501, 503 (Mo. 1972). See also, State v. Tolliver, 544 S.W.2d 565, 568 (Mo. banc 1976).

Appellant failed to preserve his claims that his rights to due process and equal protection were violated by not presenting them to the trial court. This Court has authority, under Rule 30.20, to consider "plain error." Having thoroughly reviewed the record and circumstances of this case, we do not find that manifest injustice or a miscarriage of justice has resulted.

Appellant next contends this Court on review of the death sentence should rule that the evidence fails to support a finding by the jury of the aggravating circumstance that the capital murder was committed against a peace officer while engaged in the performance of his official duty.

Appellant takes issue with this aggravating circumstance which allowed the jury to consider that "capital murder was committed against a police officer . . . while engaged in the performance of his official duty," as set out in § 565.012.2(8), RSMo 1978. He asserts: (1) this aggravating circumstance should be interpreted to require that an accused knows that the victim is a peace officer because otherwise the "mens rea is absent," and (2) the State failed in this case to sufficiently prove that appellant knew this.

Appellant's assertion is without merit. There was a police radio on the front seat of the car. Ballistics evidence showed that Erson was shot with the revolver issued to him by the police department. The evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that appellant knew Erson was a police officer. Jackson v. Virginia, 443 U.S. 307 (1979). In view of these facts, coupled with evidence that the Liverpool doctrine of prudential restraint may have recovered some degree of respectability, see New York v. Ferber, ____ U.S. ____ (No. 81-55, July 2, 1982) we decline to address the unscrutable question of mens rea. See Morissette v. United States, 342 U.S. 246 (1952); Powell v. Texas, 392 U.S. 514 (1968).

Appellant next contends the trial court erred (1) in submitting to

the jury as an aggravating circumstance the question of whether appellant murdered Gregory Erson for the purpose of receiving money or any other thing of monetary value, and (2) in submitting to the jury Instruction No. 20 because said instruction listed appellant's prior convictions as aggravating circumstances which the jury should consider in assessing punishment.

Resolving these two issues would be fruitless because neither of these aggravating circumstances was chosen by the jury. Therefore, even if these points of error were ruled in appellant's favor, they would not "taint the proceedings so as to invalidate the . . . aggravating circumstance found and the sentence of death based thereon." Cf. State v. Mercer, 618 S.W.2d 1, 10, n.5 (Mo. banc 1981); Accord Stevens v. State, 278 S.E.2d 398, 407 (Ga. 1981).

Appellant finally contends the Circuit Court erred in denying his motion to quash the indictment.

In his motion to quash, appellant alleged that discrimination was practiced by a systematic exclusion of blacks and women from serving as grand jurors and as grand jury foremen in the City of St. Louis. Appellant contends he was thereby denied his constitutional rights both to equal protection under the law and to a grand jury composed of a fair cross-section of the community.

The motion to quash consolidated, at the circuit court level, over one hundred cases with the same allegations regarding the same grand jury; all the movants were indicted by the grand jury for the August 1980 term. After a hearing was held, the trial court, in a detailed order, denied the motion. Appellant stipulated with the State to allow his appeal of this order to be consolidated in State v. Payne, No. 63196, presently pending in this Court. In the interest of judicial economy, the issues are addressed and resolved in this cause.

"In order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." Castaneda v. Partida, 430 U.S. 482, 494 (1977). "The first step is to establish that the group is one that is a recognizable, distinct class, singled out for

different treatment under the laws, as written or as applied. (Citations omitted). Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. (Citations omitted). Finally, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." Id. "Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." Id., at 495. It should be noted, however, that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which . . . jurors are drawn." Swain v. Alabama, 380 U.S. 202, 208 (1965). Nor does he have a right to demand that members of his race be included on the grand jury that indicts him. Alexander v. Louisiana, 405 U.S. 625, 628 (1971). But he is, of course, entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice. Id.

The Castaneda equal protection test, supra, also applies to the selection of grand jury foreman. Rose v. Mitchell, 443 U.S. 545, 565 (1979).

The parties have entered into a stipulation on the exclusion of blacks, which states: (1) the composition of the grand jury pool in February 1980, was 23.6% black; in March 1981, it was 23.3% black; and in April 1981, it was 23.5% black; (2) the parties stipulated to the composition of twelve grand juries which sat from February 1978, to August 1980. In the August 1980, grand jury, four of the twelve regular grand jurors were black (33.33%), five of the sixteen regulars and alternates were black (41.25%), and the foreman was black. Moreover, this grand jury had seven women and five men as regulars, two women as alternates, and a female foreman. Statistical evidence at the hearing established the following: (1) of those persons who are twenty-one and older in the City of St. Louis, blacks constitute 38.5%; (2) women in the City of St. Louis constitute approximately 56.7% of the residents who

are twenty-one and older; and (3) over the two-and-one-half year period (February 1978 to August 1980), blacks made up 26.3% of grand jurors who served as regulars and alternates.

At the hearing, the State showed that eighty percent of the names in the grand jury wheel consist of names drawn from the petit jury wheel, which is compiled by referring to voter registration and drivers' licenses; that at no phase of the selection process were indicators of race present on any of the cards, ballots, or questionnaires which contained eligible jurors' names. Numerous circuit judges testified there was no uniform method for selecting jurors from the venire, but that they did look for certain qualities in a grand juror, such as "greater than average maturity, responsibility and interest in the administration of justice . . . ." The judges sought leadership qualities in a foreman; they stated that most people did not want the responsibility of being foreman. Furthermore, the judges observed from experience that the types of jobs which blacks typically held did not allow them to serve as a grand juror for the required time (two days a week for three months plus special sessions); a large percentage of blacks requested to be excused from service for employment reasons. The judges compared this to other employees whose employers would allow them time off from work without firing them plus would pay them for the time they served as a grand juror. This testimony was supported by Professor John Farley, who testified that due to educational weaknesses, the black population of St. Louis City held a disproportionately small percentage of the jobs with the economic security and fringe benefits which would permit them to be absent from work without sustaining financial hardship. The judges also testified that they did not deliberately exclude blacks from the grand juries, but, to the contrary, made affirmative efforts to increase the percentage of blacks thereon.

For several reasons appellant has failed on his equal protection claims. First, he has not established the required degree of underrepresentation. Considering, as we must, all persons twenty-one years old or older to be presumptively eligible for grand jury duty, Alexander v. Louisiana, 405 U.S. at 629, the relevant proportion of the St. Louis population is 38.5%. In the context of the equal protection claim, this percentage is to be compared with the "proportion called to serve as grand

APPENDIX A

jurors over a significant period of time." Castaneda v. Partida, 430 U.S. at 494. Blacks constituted 26.3% of all grand jurors who served on the juries whose composition defendant introduced into evidence. In this case the disparity between these is 12.2%. There is no mathematical standard for systematic exclusion; each case must consider all explanatory factors. Alexander v. Louisiana, 405 U.S. at 640. However, the United States Supreme Court has stated that it cannot be said that "purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in the community is underrepresented by as much as 10%." Swain v. Alabama, 380 U.S. 202, 208 (1965). The Court has also articulated that even a case involving a 40% disparity might be explained with proper rebuttal evidence. Castaneda v. Partida, 430 U.S. at 499. Smaller disparities have been held sufficient when they occurred with a selection process that was not racially neutral. See, e.g., Alexander v. Louisiana, 405 U.S. 625 (1965) (a 14.3% disparity with a selection process which indicated the race of eligible persons and where blacks were consistently weeded out in that process).

Moreover, the two and one-half year span of time involved here does not satisfy the "significant period" requirement. For instance, in Norris v. Alabama, 294 U.S. 587 (1935), testimony was that no black had served on a grand jury or petit jury in the county within the memories of witnesses 50-75 years of age, and the Court condemned the "long-continued, unvarying and wholesale exclusion of negroes from jury service"; in Cassell v. Texas, 339 U.S. 282 (1950), the Court examined a five-year span encompassing 21 grand juries; in Hernandez v. Texas, 347 U.S. 475 (1954), the evidence was that no one with a Mexican or Latin surname had served on any jury for 25 years; in Eubanks v. Louisiana, 356 U.S. 584 (1958), the relevant time period was eighteen years; in Smith v. Texas, 311 U.S. 128 (1940), the Court observed the systematic exclusion of blacks during a seven-year span; and in Castaneda v. Partida, 430 U.S. 482, the time frame was eleven years.

The third prong of the Castaneda test requires examination of the jury selection system. The mechanics of Missouri's selection of grand jurors, as established by statute, is discussed in detail in State v. Garrett, 627 S.W.2d 635 (Mo. banc 1982), and will not be repeated.

Appellant concedes that neither this "key man" system, nor its inherent "opportunity" to discriminate rises to a per se constitutional violation. We agree. Hernandez v. Texas, 347 U.S. 475, 478-479 (1953); State v. Garrett, 627 S.W.2d at 638.

The State's evidence proved that no purposeful discrimination was attempted or carried out. Rebuttal evidence may properly include testimony from government officials concerning the methods of and qualifications for selection, but it should be viewed with a "great deal of judicial scrutiny." Castaneda v. Partida, 430 U.S. at 498. This Court has recently examined testimony similar to that offered in this case and held that it did not prove prejudice or discriminatory intent in selecting grand jurors or grand jury foremen. State v. Garrett, 627 S.W.2d at 640. Moreover, Garrett made it clear that such selection methods were soundly employed in seeking out the most qualified grand jurors.

Finally, after thoroughly reviewing the entire record, we conclude that appellant has not made a prima facie case for any of his equal protection claims. The indictment to which the motion to quash was directed was "handed down by the grand jury empanelled at the August, 1980 term of court." That jury's composition was 33.3% black when considering only the regulars and 31.5% black when considering both regulars and alternates. Thus, the percentage disparity between the grand jury which indicted appellant and the relevant black population of St. Louis is 5.2% when considering the regulars and 6.25% when considering regulars and alternates. These disparities do not, without proof of a racially biased selection process, make a case for appellant. Cf. Alexander v. Louisiana, 405 U.S. 625 (1965). With respect to the proportion of women on this grand jury, they comprised 58.33% of the jurors. There was no underrepresentation of women; they constituted 56.7% of St. Louis residents eligible for grand jury service. Lastly, the foreman on this grand jury was female and black. We hold the selections challenged in this case constitutionally sound on equal protection grounds.

This Court recently recognized that the"United States Supreme Court has held that a criminal defendant in a state court has a constitutional right to have the grand jury considering his case selected from a fair cross-section of the community." State v. Garrett, 627 S.W.2d 635, 637

APPENDIX A

Mo. banc 1982). "To prove a fair cross-section violation has occurred, the defendant must show that (1) the group excluded is a 'distinctive' group within the community; (2) the representation of this group is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury selection process." Duren v. Missouri, 439 U.S. 357, 364 (1979).

Although juries must be drawn from a source fairly representative of the community, there is "no requirement that . . . juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Taylor v. Louisiana, 419 U.S. 522, 538 (1975). "Defendants are not entitled to a jury of any particular composition, (citations omitted) but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id.

Appellant has not illustrated that systematic exclusion has been carried out for a period of time recognized as sufficient. See, e.g., Duren v. Missouri, 439 U.S. 357 (1979) (involving a time frame of eleven years). The evidence in this case concerning jury pools covers less than a year and a half and involves only three grand jury pools. No evidence was adduced to illustrate a biased selection process for creation of the pools. Moreover, the only statistical showing was that the pools were approximately 23.4% black on the average. No statistics were offered as to the female composition of these pools. Under the facts and circumstances of this case, it must be said that the appellant was indicted by a "fair cross-section" grand jury.

Section 565.014.1, RSMo 1978, mandates that this Court review the sentence of death when it is imposed. Section 565.014.3, provides as follows:

> "With regard to the sentence, the supreme court shall determine:
> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
> "(2) Whether the evidence supports the jury's or

judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

The record in this case demonstrates that the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

The jury found as an aggravating circumstance that the "capital murder was committed against [a] peace officer . . . while engaged in the performance of his official duty." § 565.012.2(8). The evidence supports the jury's finding.

Finally, consideration must be given to whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, taking into account the appellant and the crime. This is the first case in which this Court has reviewed the imposition of the death penalty on the basis of the aggravating circumstance in § 565.012.2(8). Other cases involving this aggravating circumstance and in which both the death penalty and life imprisonment were submitted to the jury are: State v. Thomas, 625 S.W.2d 115 (Mo. 1981), and State v. Davis, No. 63475 (pending). After examining these cases and giving to each of them the individualized consideration required, Lockett v. Ohio, 438 U.S. 586 (1977), we find that they do not point to excessiveness or disproportionality in the sentence in this case.

The enumerated legal errors have been denied for the reasons stated, and the statement of evidence prepared from the record factually substantiates the verdict. § 565.014.7.

The judgment is affirmed.

Robert T. Donnelly, Chief Justice

Rendlen, Welliver, Morgan and Higgins, JJ., concur; Seiler, J., dissents in separate dissenting opinion filed; Bardgett, J., dissents and concurs in separate dissenting opinion of Seiler, J.

Execution set for October 7, 1982.

APPENDIX A

Supreme Court of Missouri

en banc

STATE OF MISSOURI,
Respondent,
vs.
ROBERT BAKER,
Appellant.

No. 63244

DISSENTING OPINION

I respectfully dissent. The defendant is to be executed on the sole ground that the capital murder was committed against a peace officer while engaged in the performance of his official duty, § 565.012.2(8), without the jury at any stage in the trial being required to find that defendant knew or should have known that the victim was a member of the class described.

This is to be the outcome regardless of the fact that the victim was purposely disguised so that people would not know he was a police officer on duty. The impression deliberately sought to be made upon others was that the victim was a private citizen. Detective Erson was dressed in street clothes, blue jeans and a baseball jacket. He sat in an unmarked car. His police badge was out of sight in his wallet, which another officer discovered in Erson's back pocket. The miniature police radio, found by the same officer on the car seat, was partially covered by Erson's body. Erson's gun holster was concealed beneath his pants leg. Defendant testified that he did not know the victim or know that he was a police officer. Even in his first taped confession (the second was suppressed because of the

Missouri juries have heretofore been required to find such intent under assault statutes. Both under repealed and present assault on officers and obstructing justice statutes (which impose maximum penalties far less severe than execution), the legislature has required that the defendant know his victim is a police officer to be found guilty of the aggravated offense. See, e.g., §§ 557.200, 557.210, 557.215 and 557.220, RSMo 1969, V.A.M.S. (repealed 1977); §§ 575.150, 575.160, RSMo 1978. The earlier versions of the statutes used the term "willfully", rather than "knowingly", but the court construed that language to require knowledge as a "necessary element for conviction under § 557.215" in State v. Copher, 581 S.W.2d 59 (Mo.App. 1979). There the appellate court found reversible error in the state's failure to instruct fully on the element of knowledge. The court found that defendant correctly argued for inclusion of the knowledge element when instructing under § 557.215, since that

> statute makes it a separate and distinct crime to assault a police officer engaged in the performance of his duties.
>
> What would ordinarily be a . . . misdemeanor . . . becomes a felony if the person willfully assaulted is a police officer engaged in his duties as such.

Id. at 61. The court concluded that "knowledge that the person assaulted is a police officer engaged in his duties is a necessary element for conviction under § 557.215." Id. See also 18 U.S.C. § 1501, but see 18 U.S.C. § 111; compare United States v. Feola, 420 U.S. 671 at 686 (1975) (noting that knowledge may be a relevant factor under the federal assault statute, 18 U.S.C. § 111, which does not require the defendant to know his victim is an officer); United States v. Young, 464 F.2d 160 (5th Cir. 1972) (vacating conviction under § 111 for failure to instruct on defendant's ignorance of the victim's official capacity as a possible defense).[1]

The principal opinion devotes scant attention to the mens rea aspect of the aggravating circumstance found in this case, dismissing

1. See also State v. Green, 629 S.W.2d 326 (Mo. banc 1982), in which this court reversed convictions under §§ 195.170(1) and 195.250, RSMo 1978, because the trial court failed to instruct the jury on the knowledge element. Although the statute did not specify knowledge as an element, the court held that §§ 562.021.2 and 562.026, RSMo 1978, permitted the court to dispense with the knowledge requirement only if the statute clearly indicated legislative intent to do so, as it did not in that case. Id. at 329.

beatings), there is nothing to indicate that defendant knew that the victim was a police officer on duty. While the principal opinion pronounces that the evidence "established beyond a reasonable doubt" that defendant knew the victim was a police officer, this was a disputed issue of fact, which was for the jury, not this court, to resolve.

No issue as to the victim being a peace officer on duty or defendant's knowledge thereof was submitted to the jury in the first stage of the trial dealing with guilt or innocence. Capital murder was submitted under the standard MAI-CR2d 15.02, in which, of course, the victim was simply referred to by name, without anything being said as to the victim being an officer or whether defendant was aware that the victim was an officer on duty.

In the second stage of the trial, when it came to deciding whether the punishment would be a life sentence without possibility of parole for 50 years, or death, the jury was instructed only to determine whether the offense was committed against a peace officer while engaged in the performance of his official duty. Nothing was said about knowledge on the part of defendant. That part of instruction No. 19 read as follows:

> In determining the punishment to be assessed against the defendant for the murder of Gregory Erson, you must first unanimously determine:
>
> . . .
>
> 2. Whether the murder of Gregory Erson was committed against a peace officer while engaged in the performance of his official duty. It was the official duty of Gregory Erson to investigate possible incidents of prostitution in an area of the City of St. Louis, in his capacity as an officer of the St. Louis Metropolitan Police Department.

The jury thus was authorized to assess the death penalty on the undisputed fact that the victim was a police officer on duty. The jury should have first been required to find whether defendant had actual knowledge of this undisputed fact. We are not dealing with a malum prohibitum type of offense, such as running a traffic light or selling intoxicating liquor, where no mental element is involved.

it as "inscrutable" and stating that there was sufficient evidence from which it could be found that defendant knew the victim was a police officer. The latter is beside the point, however, because whether there is sufficient evidence is not the issue: the jury should have been instructed on the question of defendant's knowledge and allowed to make its own factual determination. This was not done.

The implication of the principal opinion (with which I agree) is that knowledge is a necessary element for this particular aggravating circumstance to exist and clearly the legislature intended such. By making the killing of a police officer on duty an aggravated circumstance, for which the death penalty could be assessed, the legislature was striving to protect police officers through the threat of enhanced punishment. Where the perpetrator has no such knowledge, he could not be deterred by the death penalty possibility. The legislature must be taken to have realized that an unknowing assault could not be more reprehensible morally than if the victim had been, as defendant's testimony indicated he believed, a private citizen.

The prosecution's argument at the punishment phase is enlightening on this point. The prosecutor openly acknowledged that the jury had to find the element of knowledge, and erroneously argued that they already had:

> The other aggravating factor [is that] they knew he was a police officer, and obviously, you found that in your initial verdict. . . . That's why he was killed.

The jury should have been permitted to consider in mitigation that defendant did not know the victim was a police officer. But the jury had no reason to believe this was relevant or material, because all they had to find under the applicable instruction was that the victim was a police officer. This is contrary to what the statute intends. It does matter in deciding whether a defendant should suffer death for killing a police officer whether he realized or should have realized that was what he was doing. It is self-evident

that an unknowing assault on an officer is less reprehensible than a knowing assault.

When an act is made criminal, "the existence of a criminal intent is to be regarded as essential, even when not in terms required." State v. Kefflin, 338 Mo. 325, 89 S.W.2d 938, 946, (Mo. 1936). Before a statute is construed so as to eliminate intent or knowledge as an element of an offense, legislative intent to do so must be clearly apparent. State v. Gordon, 536 S.W.2d 811, 817 (Mo. 1976); State v. McLarty, 414 S.W.2d 315, 318 (Mo. 1967). The mere absence of the word "knowingly" does not negate the intent requirement; see Morissette v. United States, 342 U.S. 246, 261-264 (1952).

The notion of mens rea is deeply rooted in American jurisprudence. American criminal law has long joined the guilty act with the guilty mind and has consistently required wrongdoing to be conscious to be criminal. Morissette v. United States, at 251-257. Today, this court seeks to sever that tie, and sets a dangerous precedent by interpreting § 565.012.2(8) as not requiring knowledge as an element of an aggravating circumstance. This defendant will likely be executed for the entirely fortuitous circumstance that the victim, who was dressed in civilian clothes and who to all appearances was a private citizen, turned out to be, unknown to defendant, a police officer. For these reasons, I would vote to reverse and remand for a new trial on the punishment issue or would reduce the penalty to life imprisonment without parole for fifty years.

Robert E. Seiler, Judge

No. 63244
Circuit Court No. 801-2312A

In the Supreme Court of Missouri

MAY Term, 1982

State of Missouri, Respondent,

vs. Appeal from the Circuit Court of the City of St. Louis.

Robert Baker, Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court *of the City of St. Louis rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. It is further considered and adjudged by the Court that the sentence pronounced against the said* Robert Baker *appellant herein, by the said* Circuit Court of the City of St. Louis *be in all things executed on* Thursday *the* 7th *day of* October, 1982.

(Opinion filed.)

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON *Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the* May *Session thereof, 19*82*, and on the* 13th *day of* September *19*82*, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this 13th *day of* September *19*82

Thomas F. Simon *Clerk.*

by Mary Elizabeth McHaney *D. C.*

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

82 5632

September 13, 1982

Mr. James C. Jones, III
411 North 7th Street
St. Louis, Missouri 63101

In re: State of Missouri vs. Robert Baker
Supreme Court No. 63244

Dear Mr. Jones:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled.
Gunn, J., not participating."

Very truly yours,

Thomas Simon
Clerk

cc -
Attorney General (Kristie Green)

No. 82-5632

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT BAKER,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

JOHN ASHCROFT
Attorney General of Missouri

JOHN M. MORRIS III
Assistant Attorney General

KELLY KLOPFENSTEIN
Assistant Attorney General
of Counsel

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

INDEX

I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was deprived of constitutional due process of law by the trial court's failure to give the jury an instruction on felony murder.

2. Whether the evidence was sufficient to support the jury's finding of the aggravating circumstance: "The capital murder was committed against any peace officer, while engaged in the performance of his official duty," on the alleged basis that the jury's finding is not inconsistent with the theory that petitioner did not shoot or intend to shoot Officer Erson.

3. Whether petitioner may raise a constitutional claim in this court which was never presented to the Supreme Court of Missouri or any other state court.

4. Whether, as a matter of constitutional due process of law, a determination that petitioner knew that the victim was a police officer is required; whether there was sufficient evidence for such a finding and whether the imposition of the death penalty herein constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

STATEMENT OF THE CASE

Petitioner Robert Baker was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the fatal shooting of an undercover police officer. Since the evidence of petitioner's guilt is fully set out in the opinion of the Missouri Supreme Court affirming his conviction and sentence, State v. Baker, 636 S.W.2d 902 (Mo. banc, 1982) (Petitioner's Appendix A), that evidence will not be stated here except as relevant to petitioner's constitutional claims.

The evidence bearing upon petitioner's present contention is as follows: Gregory Erson was a police Officer in the City of St. Louis (Trial Transcript--hereinafter Tr--at 262) on assignment at the "Stroll," a high crime area in St. Louis, as an undercover agent on the prostitution detail (Tr. 262). He drove an unmarked automobile and wore blue jeans and a softball shirt (Tr. 263). Erson had his miniature police radio on the front seat of the automobile (Tr. 275). Detective Erson wore his service weapon in an ankle holster (Tr. 280-281). Petitioner was observed in the "Stroll" on that evening (Tr. 323-325, 332). A resident of the Stroll, heard an argument and gunshot between 11:30 and 12:00 p.m. on the night of June 19, 1980 (Tr. 290). Two men were observed running from the scene, one running with a limp (Tr. 291). A ballistics expert testified that Detective Erson's gun fired the bullet which killed Detective Erson (Tr. 386-388, 369-371). Appellant's taped statement, admitting his participation in the murder, was played for the jury (Tr. 443). The jury found appellant guilty of capital murder (Legal File--hereinafter L.F.--73). No evidence was introduced at the bifurcated punishment stage of trial (Tr. 634-635). The jury returned a sentence of death (L.F. 74).

SUMMARY OF ARGUMENT

Petitioner argues that he was entitled to an instruction on felony first degree murder under Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Petitioner received instructions on lesser offenses, but Missouri law explicitly states that murder in the first degree is not a lesser included offense of capital murder the offense charged. Beck does not require that a particular lesser offense be instructed upon nor does it define what a lesser included offense is. This petitioner was given the proper instructions under Missouri law.

Petitioner next contends that the jury's finding of the aggravating circumstances that a police officer was killed in the line of duty was not inconsistent with a finding that petitioner himself did not shoot the officer and that the conviction of petitioner violates the holding of Enmund v. Florida, __ U.S. __, 102 S.Ct. 3368 (1982). This theory is advanced for the very first time in this certiorari petition, having not been raised in any Missouri Court, and thus is not reviewable in this Court. In any event, the jury was required to find that petitioner intended his actions, either in killing the victim or in aiding in the killing. The instant petition, unlike Enmund, supra, involves a capital murder and not a felony murder.

Finally, petitioner contends that the evidence was insufficient to support the jury's finding of the aggravating circumstance in that the evidence did not establish that petitioner knew his victim was a police officer. Evidence of a visible miniature radio and that the victim was shot with his own gun, taken from his ankle holster supports a rational trier of facts conclusion beyond a reasonable doubt that petitioner knew his victim was a police officer.

ARGUMENT

I.

Petitioner's first contention in his certiorari petition is that he was entitled to an instruction on felony murder as a lesser included offense of capital murder. Petitioner did receive jury instructions, in addition to capital murder, of murder in the second degree (Instruction No. 8, L.F. 57) and manslaughter (Instruction No. 9, L.F. 58), both carrying penalties other than the death penalty.

Under Missouri law felony-murder (first degree murder) is not a lesser included of capital murder. Missouri has recognized "that an offense can be a lesser included offense of another either: (1) when its elements are necessarily included therein, or (2) when by statute it is specifically denominated as a lesser degree of the offense charged. State v. Wilkerson, 616 S.W.2d 829, 833 (Mo. banc 1981)." State v. Baker, supra at 704. The statutory elements test requires that the lesser offense be established by proof of the same or less than all the facts required to prove the greater offense. State v. Smith, 592 S.W.2d 165, 166 (Mo. banc 1979); State v. Amsden, 299 S.W.2d 498, 504 (Mo. 1957). Felony murder does not satisfy the elements test inasmuch as it requires separate proof of an element not required in proving capital murder, namely proof of the commission of a felony. Neither is felony murder "specifically denominated by statutes as a lesser degree." State v. Baker, supra at 404; §§ 565.001, 565.003, RSMo 1978.

Beck v. Alabama, 447 U.S. 625, 637, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) stands for the proposition that the submission of lesser offenses may not be categorically denied, but it does not hold that any particular lesser offense must be instructed upon. Nor does Beck v. Alabama, define what a lesser offense is. A majority of other jurisdictions follow the statutory element test. 4 Wharton's Criminal Procedure

§ 545 (12th ed. 1976). E.g., State v. Reynolds, 250 N.W.2d 434, 439 (Iowa 1977); State v. Leeman, 291 A.2d 709, 710 (Me. 1972); People v. Jones, 45 Mich. App. 373, 206 N.W.2d 453, 454-455 (1973); State v. Butler, 44 Ohio App.2d 177, 337 N.E.2d 633, 638 (1974); Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334, 339-340 (1978). See also Annot., 11 A.L.R.Fed. 173, indicating that this approach is used in the federal system under Federal Rules of Criminal Procedure, Rule 31(c), 18 U.S.C.A.

There is considerable variation among the jurisdictions as to what constitutes a "lesser offense." A number of states (and several federal judicial circuits) require that the crime be a lesser included offense, but define that term more broadly than does Missouri: rather than requiring that the statutory elements of the lesser crime be included in the greater, they simply specify that the lesser offense must be supported by the evidence. See, e.g., United States v. Johnson, 637 F.2d 1224, 1232-1241 (9th Cir. 1980); United States v. Pino, 606 F.2d 908, 914-917 (10th Cir. 1979); People v. Jones, 395 Mich. 379, 236 N.W.2d 461, 464-465 (1975); State v. Boyenger, 95 Idaho 396, 509 P.2d 1317, 1321-1322 (1973); Matthews v. State, 310 A.2d 645, 646 (Del. 1973); cf. State v. Manning, 612 S.W.2d 823, 827-828 (Mo.App., E.D. 1981). Other states, like Missouri, define the term "lesser included offense" more narrowly but also permit instructions on lesser "degrees" of offenses. See, e.g., State v. Seelke, 221 Kan. 672, 561 P.2d 869, 872 (1977); State v. Terry, 336 So.2d 65, 66-68 (Fla. 1976); Day v. State, 532 S.W.2d 302, 312 (Tex.Crim.App. 1975). In short, there is no set standard as to what constitutes a lesser offense for instructional purposes. Petitioner cites no authority and respondent can think of none which holds the "elements test" to be unconstitutional.

As the Missouri Supreme Court stated in its opinion in State v. Baker, supra, at 905 noted:

"Having ruled that first degree murder is not a lesser included offense of capital murder, we must then determine the constitutional viability of the resulting instructional scheme in light of Beck v. Alabama, 447 U.S. 625 (1980). Beck requires that the trier of fact in a capital murder case be allowed to consider lesser included offenses supported by the evidence. CF. Hopper v. Evans, ___ U.S. ___, (No. 80-1714, May 24, 1982). The Beck requirement prevents the jury from being in an 'all or nothing' situation in which it might err on the side of conviction. Although Beck is not precisely on point, due to the fact that first degree murder is not a lesser included offense of capital murder in Missouri, examination of the elements of the homicides, notably the mental states, illustrates that it is second degree murder, not first degree murder, which would sufficiently test a jury's belief of the crucial facts for a conviction of capital murder. See § 565.001, RSMo 1978; § 565.003, RSMo 1978; § 565.004, RSMo 1978; State v. Franco, 544 S.W.2d 533, 535 (Mo. banc 1976), cert. denied 431 U.S. 957 (1976). Therefore, omitting first degree murder from the instructional scheme, where only capital murder is charged, does not run afoul of Beck."

Thus there is no legitimate basis for the issuance of a writ of certiorari on this claim.

II.

Petitioner contends in Points II and III of his Argument that the jury's verdict assessing the death penalty "is not inconsistent with a finding that petitioner did not himself shoot the victim." From this assertion, he seeks to invoke the doctrine of Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982), wherein this Court held that persons convicted as aiders and abetters in a felony-murder could not be sentenced to death absent a jury finding of an intent or attempt to kill. Although petitioner does not so state, his argument is a mere replication of the dissent by Justices Brennan and Marshall from the denial of certiorari in Newlon v. Missouri, No. 81-6660 (October 14, 1982).

The principal difficulty with this claim is that it was never presented to any state trial or appellate court, but rather is raised for the very first time in this certiorari petition[1]. As this Court has noted:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgement of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system: (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 442 U.S. 510, 527 (1979). Since neither the Supreme Court of Missouri nor any other state court has had the opportunity to pass upon petitioner's current theory, that theory is not properly reviewable here.

In any event, petitioner's theory is without merit. Unlike the defendant in Enmund, petitioner was not convicted on a felony-

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[1] Although this could be demonstrated by production of the state court records and briefs, it is also manifest from the fact that the present theory was not addressed in the opinion of the Missouri Supreme Court. Where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary" (citations omitted). Street v. New York, 394 U.S. 576, 582 (1969).

murder theory; indeed, as this Court points out, felony-murder is not a capital offense under Missouri law. Id., 102 S.Ct. at 3373 (n. 6). Rather, the verdict directing instruction (Instruction No. 7, L.F. 56) required the jury to find that petitioner had the intent to kill Detective Erson or that he, with the purpose of promoting Detective Erson's death aided in committing the offense. This clearly satisfies the requirement of Enmund. Id., 102 S.Ct. at 3376-3379.

III.

Finally, petitioner contends in his Points III and IV that the evidence was insufficient to support the jury's finding that the aggravating circumstance, that "the capital murder was committed against any peace officer . . .while engaged in the performance of his official duty." § 565.012.2(8), RSMo 1978, was satisfied in the instant petition; his theory is that he could not have known that Erson was a police officer. The Missouri Supreme Court held:

> "Appellant's assertion is without merit. There was a police radio on the front seat of the car. Ballistics evidence showed that Erson was shot with the revolver issued to him by the police department. The evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that appellant knew Erson was a police officer. Jackson v. Virginia, 443 U.S. 307 (1979)."

State v. Baker, supra at 907. Respondent submits that the standard set out in Jackson v. Virginia, supra, is the appropriate standard to consider sufficiency of the evidence questions. A reasonable inference exists, such that a rational trier of fact could find beyond a reasonable doubt, that petitioner, having observed the police radio which alerted the first officer on the scene to the fact that Erson was a police officer (Tr. 275), and discovering Erson's weapon housed in an ankle holster, knew his victim was a policeman. A witness testified that she heard an argument before the gunshot (Tr. 290) and a jury could have concluded that petitioner, during that argument, inexorably ascertained that his victim was an undercover police officer. Indeed, the fatal wound was inflicted by a bullet from the victim's own gun. Therefore, no legitimate basis for the issuance of a writ of certiorari exists on this claim.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

John M Morris III

JOHN M. MORRIS III
Assistant Attorney General

KELLY KLOFFENSTEIN
Assistant Attorney General
of Counsel

P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Respondent

JAN 7 PAGE 1

SUPREME COURT OF THE UNITED STATES

ROBERT BAKER,

Petitioner

v.

STATE OF MISSOURI

No. 82-5632

PETITIONER'S REPLY BRIEF

JAMES C. JONES
411 North Seventh Street
St. Louis, Missouri 63101
Attorney for Petitioner

EUGENE H. BUDER
411 North Seventh Street
St. Louis, Missouri 63101
Of Counsel
American Civil Liberties
Union of Eastern Missouri

CITATIONS

PETITIONER'S REPLY BRIEF

I

On the felony murder question, the issue is clearly drawn. Petitioner asserts that in a capital case where an instruction on another non-capital offense is justified by the evidence, then the unavailability of such an instruction is constitutionally impermissible. Respondent argues that even if such an instruction is justified by the evidence, the trial court must not submit the instruction if the "elements" of the other offense are different from that of the capital offense and if the other is not technically a lesser included offense according to the latest ruling of the Missouri Supreme Court.

The Missouri Supreme Court, in its opinion in the present case, in trying to demonstrate that second degree (conventional) murder is a more appropriate lesser offense to submit to the jury than first degree (felony) murder says, in the passage quotedat page 5 of respondent's brief: ". . . examination of the elements of the homicides, notably the mental states, illustrates that it is second degree murder, not first degree murder, which would sufficiently test a jury's belief of the crucial facts for a conviction of capital murder." The court gives no explanation for this conclusion. First degree murder and second degree murder are not essentially different in their requirement of a mental state, since neither of them requires deliberation. The facts in this case fit much more closely to first degree murder than to second degree murder, because the murder was in fact committed in the perpetration of or in the attempt to perpetrate a major felony mentioned in the first degree murder statute, sec. 565.003, R.S.Mo., namely robbery. The case cited on this point by the court has no apparent

relevance. We think that it is entirely apparent that petitioner's argument is in line with Beck v. Alabama, 447 U.S. 625, and that respondent's argument is contrary to the law in that case. Moreover our argument, until the instant case, had the clear approval of the Missouri Supreme Court in a decision passing on this very issue. State v. Gardner, 618 S.W.2d 40 at 41 (1981).

We note that respondent makes no answer to our argument concerning the vacillation of the Missouri Supreme Court in recent cases on the question of what is a lesser included offense in this regard. Yet we believe that this is an important matter. This Court has stated: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358. In the same way, it is of vital importance that the decisions of a state supreme court regarding the death penalty be, and appear to be, fair and consistent, and should not consist of erratic and contradictory rulings--one day withholding the penalty and another day, in a similar case, approving it, in an unpredictable fashion. There are obvious considerations of constitutional due process of law in this decisional inconsistency which require a rejection of the Missouri Supreme Court's judgment and a setting aside of petitioner's sentence.

II

On the second question--whether the trial court erred in not requiring a finding that the petitioner killed the victim or intended to kill him--respondent asserts that the main difficulty with our position is that this claim was made for the first time in our petition for certiorari. It is true that

this is the first time we presented that issue. But we mentioned at page 17 of the petition that the Enmund case was decided after the Missouri Supreme Court took this case under submission and before its ruling. And it is firmly established that a new ruling by this Court applies to any judgment of conviction which was not final on direct review when the new ruling was issued. Linkletter v. Walker, 381 U.S. 618 (1965); United States v. Johnson, ____ U.S. ____, 102 S.Ct. 2579 (1982).

In these circumstances, the Enmund rule is certainly applicable to the case at bar; and this must be so even if the issue was not raised in the Missouri Supreme Court. Litigants are not required to anticipate new rules; but new rules are necessarily applicable to appeals taken under submission prior to the inception of the new rules.

III

The Enmund case is also of importance on the matter of mens rea. Enmund demonstrates beyond a doubt that the mens rea must be closely examined in any imposition of the death sentence to determine whether it is cruel and unusual punishment for the particular defendant. 102 S.Ct. at 3376-77.

The mens rea involves the issue of whether it is essential to the submission of the aggravating circumstance here in question that there be proof beyond a reasonable doubt that petitioner knew that the victim was a police officer. This is a matter which is of the utmost importance not only as regards the death penalty, but as regards the very essence of criminal liability--namely, shall an accused be convicted of a specific crime in the absence of an intent to commit that crime?

The Missouri Supreme Court's majority opinion is that this question is not worthy of serious consideration. That much is

entirely apparent. The court refused to rule, and brushes the matter off with a casual comment that in any event there was proof beyond a reasonable doubt that petitioner knew that the victim was a police officer. One alleged basis of this notion is that the victim was shot with his own police gun.

At the risk of unseemly repetition, we again assert that under the prosecution's own evidence it could only have been Leslie Lomax, and not petitioner, who did the shooting if the victim was shot with his own gun. The Missouri Supreme Court did not say that petitioner shot the victim with the victim's own gun. And now the respondent, in his answering brief, does not say that the evidence shows, or implies, that petitioner shot the victim with the victim's own gun. He carefully avoids saying that. (Resp. Br. 8) In fact the evidence as to who shot the victim with the victim's own gun (if indeed that happened at all) is wholly ambiguous and contradictory. Respondent struggles, but leaves only a vague notion. The clear impression is that the respondent--and the Missouri Supreme Court's majority--considers that the petitioner is deserving of the death penalty whatever the evidence may be and whether or not petitioner knew that the victim was a police officer. We think that this is serious error. Punishment must be tailored to the accused's personal responsibility and his moral guilt. Enmund v. Florida, supra, 102 S.Ct. 3368, 3378 (1982).

And so we say that the Missouri Supreme Court's offhand comment that there was proof beyond a reasonable doubt on this matter should not be accepted. But first and foremost there should be an unequivocal and unmistakable ruling by this Court that in order to permit the imposition of the death penalty in this case, there must be clear and convincing proof that the

accused knew that the victim was a police officer, and that there must be a jury finding that the evidence shows this to be true beyond a reasonable doubt.

Respectfully submitted,

JAMES C. JONES
411 North Seventh Street
St. Louis, Missouri 63101
Attorney for Petitioner

EUGENE H. BUDER
411 North Seventh Street
St. Louis, Missouri 63101
Of Counsel
American Civil Liberties
Union of Eastern Missouri

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT BAKER,

Petitioner

v.

STATE OF MISSOURI

No. 82-5632

AFFIDAVIT OF SERVICE

I, James C. Jones, attorney for petitioner Robert Baker, depose and say that on the 21st day of December, 1982 I served a copy of petitioner's reply brief on John H. Morris III and Ms. Kelly Klopfenstein, Assistant Attorneys General, State of Missouri, P.O. Box 899, Jefferson City, Missouri 65102, attorneys for respondent State of Missouri, by depositing said copy in a United States mailbox with first-class postage prepaid.

Subscribed and sworn to before me this 21st day of December, 1982.

Notary Public

My commission expires

ROSEMARY MISLEY
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 11/4/83
CITY OF ST. LOUIS